

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE LINDEMAN

v.

PENNSYLVANIA BOARD OF
PROBATION and PAROLE, et.al.

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CIVIL ACTION
No. 97-4824

MEMORANDUM

Broderick, J.

December 17, 1999

Petitioner George Lindeman, currently serving a sentence of twelve to twenty-six years imprisonment following his conviction for third degree murder, theft and possession of instruments of a crime, filed this pro se Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the decisions of the Pennsylvania Board of Probation and Parole ("the Board"), alleging that he was denied parole "for unconstitutional reasons."

The Petition was referred to Magistrate Judge Carol Sandra Moore Wells a Report and Recommendation. Magistrate Judge Wells recommended denying the Petition for failure to exhaust state remedies. Petitioner filed timely objections to the Magistrate Judge's Report and Recommendation. The thrust of Petitioner's objections is that he should be excused from the exhaustion requirement.

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or

specified proposed findings or recommendations to which objection is made. [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b). After a de novo review of the record, the Court will adopt the Magistrate Judge's Report and Recommendation. Moreover, the Court will deny the petition on its merits.

BACKGROUND

Petitioner Lindeman is a prisoner incarcerated at the State Correctional Institution at Laurel Highlands, serving a sentence of twelve to twenty-six years imprisonment following his conviction for third degree murder, theft and possession of instruments of a crime. The minimum date for Petitioner's sentence expired January 2, 1995, while his maximum sentence will expire January 2, 2009. Petitioner Lindeman has been considered for and denied parole four times.

EXHAUSTION

It is well established that, absent exceptional circumstances, a federal court will not entertain the claims of a habeas corpus petitioner until he has exhausted the state remedies available at the time of his federal petition. 28 U.S.C. § 2254(b),(c); Picard v. Conner, 404 U.S. 270, 275 (1971); Doctor v. Walter, 96 F.3d 675 (3d Cir. 1996). The requirement of exhaustion will not be excused unless "there is an absence of available State corrective process; or ... circumstances exist that render such process ineffective to protect the rights of the

applicant." 28 U.S.C. § 2254(b)(1)(B). The habeas petitioner bears the burden of proving exhaustion of all available state remedies. Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993).

Petitioner contends that he has written to the Parole Board and was informed that he "could not appeal through the courts." Petitioner's Objections at p. 1 (Docket No. 13). Petitioner contends that he wrote to the Commonwealth Court and was informed that the Commonwealth Court "does not deal with the type of matter you describe." Id. at 2.

Upon consideration of a state prisoner's attacking a denial of parole, the Third Circuit has assessed Pennsylvania law and stated "It appears to us... that [petitioner] has available three potential ways of attacking the denial of parole in Pennsylvania courts--appeal, mandamus, or habeas corpus." Burkett v. Love, 89 F.3d 135, 142 (3d Cir. 1996). The Burkett court acknowledged that the state law in this area was "somewhat unsettled" and invited some clarification from the Pennsylvania Commonwealth Court or state Supreme Court. Id. Three notable Pennsylvania appellate decisions have subsequently been filed, foreclosing two of the three options the Third Circuit identified. See Rogers v. Pennsylvania Board of Probation and Parole, 724 A.2d 319 (Pa. 1999); Myers v. Ridge, 712 A.2d 791 (Pa. Commw. Ct. 1998); Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997).

In Rogers, the Pennsylvania Supreme Court held that direct

appeal of denial of parole is not available. See Rogers, 724 A.2d at 322 (Pa. 1999). Moreover, in Weaver, the Commonwealth Court explicitly responded to Burkett and "disagree[d] with the Third Circuit's conclusion that a prisoner can challenge a decision of the Board denying parole by filing a petition for a writ of habeas corpus." 688 A.2d at 775 n. 17.

As for the third option identified in Burkett, mandamus, the state Supreme Court in Rogers stated that prisoners "may be entitled to pursue allegations of constitutional violations against the Parole Board through a writ of mandamus." 724 A.2d at 323 n. 5. In addition, the Commonwealth Court in Myers stated that "decisions to grant or deny parole are generally not [reviewable] except to the extent that a constitutional or statutory violation has occurred." Id. at 794.

Based upon the Pennsylvania case law since the Third Circuit's decision in Burkett, the Pennsylvania courts provide a single avenue of relief to prisoners claiming their parole denials were unconstitutional: a mandamus action in the Commonwealth Court's original jurisdiction. See Carter v. N.P. Muller, et al., 45 F. Supp.2d 453, 455 (E.D.Pa. 1999)(dismissing petition for failure to exhaust mandamus). Because Petitioner did not exhaust this available remedy, the Report and Recommendation correctly concludes that his petition must be denied.

DENIAL ON THE MERITS

Moreover, even though Petitioner has not exhausted the

available state court remedy of mandamus, his petition must be denied on its merits. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available to the courts of the State.")

Petitioner contends that each of his parole denials was for "unconstitutional reasons." Under substantive due process, a state may not deny parole on constitutionally impermissible grounds, such as race or in retaliation for exercising constitutional rights. Burkett, 89 F.3d at 140.

Pennsylvania law grants the Board vast discretion to refuse or deny parole. State law authorizes the Board:

to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to the Board ... whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

61 Pa. Cons. Stat. Ann § 331.21. Under Pennsylvania law, the Board considers many different factors, all relevant to the discretionary task of granting or denying parole. See id. Specifically:

[i]t shall be the duty of the board ... to investigate and inform itself respecting the circumstances of the offense for which said person shall have been sentence, and, in addition thereto, it shall procure information as full and complete as may be obtainable with regard to the character, mental characteristics, habits, antecedents, connections, and environment of such person.

61 Pa. Cons. Stat. Ann § 331.19.

Petitioner Lindeman's parole decisions comply with Pennsylvania's statutory requirements. In 1995, the Board refused to parole Petitioner. The Parole Board's stated reasons were: "Poor prison adjustment. Substance abuse. Habitual offender. Assaultive instant offense. Victim injury. Weapon involved in the commission of offense. Your need for counseling and treatment. Unfavorable recommendation from the District Attorney." See 1995 Parole Board Decision, attached to Docket No. 7. In 1996, the Parole Board denied parole for substantially the same reasons. See 1996 Parole Board Decision, attached to Docket No. 7. In 1997, the Parole Board again refused to parole Petitioner. The Board's stated reasons were: "Unfavorable recommendation from the Department of Corrections. Need for structured re-entry. Must participate in prescriptive program plan. You must maintain a clear conduct record. You must earn an institutional recommendation for parole." See 1997 Parole Board Decision, attached to Docket No. 7.

Nothing in the parole board decisions¹ indicate that the Board relied on any unconstitutional factors when it denied Petitioner's applications for parole. Moreover, Petitioner has not alleged any action by the Board which might give rise to a substantive due process violation or equal protection violation,

¹ In his objections, Petitioner asserts that he was denied parole a fourth time. The record does not contain the 1998 parole board decision. Nonetheless, as discussed above, Petitioner does not allege that the Board relied on impermissible criteria such as race, political belief, religion, or First Amendment activity in his fourth parole denial.

such as denial of parole on the basis of race, political belief, religion, First Amendment activity, or other impermissible criteria. See Burkett, 89 F. 3d 139-140. Since the Board exercised discretion which was neither arbitrary nor capricious, and absent any allegation of a substantive due process violation, this Court shall deny the petition.

Accordingly, for the reasons stated above, the Court will adopt the Magistrate Judge's Report and Recommendation and dismiss Petitioner's Petition for a writ of habeas corpus for failure to exhaust state remedies. In addition the petition shall be dismissed on the merits, for failure to state a substantive due process violation.

An appropriate Order follows.

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O R D E R

AND NOW, this 17th day of December, 1999; after a review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells; timely objections having been filed by Petitioner; the Court having made a de novo determination of those portions of the Report and Recommendation to which objections were made; for the reasons stated in this Court's Memorandum of this date;

IT IS ORDERED: The Report and Recommendation is **APPROVED** and **ADOPTED** and the Petition for a writ of habeas corpus is **DISMISSED** for failure to exhaust state remedies.

IT IS FURTHER ORDERED: The Petition for a writ of habeas corpus is **DISMISSED** for failure to state a claim.

IT IS FURTHER ORDERED: There is no probable cause for appeal and no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability.

RAYMOND J. BRODERICK, J.